ARK LAND CO.

IBLA 92-107, 92-162 Decided July 3, 1995

Appeals from notices of noncompliance with Stipulation No. 11 of coal lease W-82736, issued by the Rawlins District Office, Bureau of Land Management, Rawlins, Wyoming.

Appeals dismissed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

If a coal lessee does not appeal a stipulation of a lease when it is issued, it may not later appeal a notice of noncompliance with the stipulation on the ground that BLM is not authorized to impose the stipulation.

2. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases--Environmental Quality: Generally--Mineral Leasing Act: Generally

BLM may enforce a special stipulation in a coal lease, for the protection of a Federal reservoir, on surface lands which are privately owned.

APPEARANCES: Blair M. Gardner, Esq., St. Louis, Missouri, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Ark Land Company (Ark) has appealed two notices of noncompliance issued by the Rawlins (Wyoming) District Office, Bureau of Land Management (BLM), on November 1, 1991, and November 19, 1991, for violations of Stipulation No. 11 of coal lease W-82736. 1/

1/ The appeal of the Nov. 1, 1991, notice of noncompliance was docketed with this Board as IBLA 92-107. The appeal of Nov. 19, 1991, notice of noncompliance was docketed as IBLA 92-162. Because of the similarity of issues involved, these appeals are consolidated for our consideration.

In September 1982 the Medicine Bow Coal Company (Medicine Bow), Ark's predecessor, 2/ filed an emergency lease application covering approximately 2,650 acres and 13 million tons of Federal coal in Carbon County, Wyoming. See 43 CFR 3425.1-4. Much of the land is contiguous with the Seminoe Reservoir, which is under the jurisdiction of the Bureau of Reclamation (BOR). As the result of an environmental analysis, BLM concluded that further coal development adjacent to the Seminoe Reservoir would result in no significant environmental effects to the area because safeguards would be applied through the mining plan permitting process (Amendment to the Hanna Basin Management Framework Plan and Draft Environmental Assessment, 1984 (EA) at 1). The EA set forth mitigating requirements for the coal lease proposal which included the following provision: "For the protection of the water values of Seminoe Reservoir, no surface occupancy will be allowed within a 200-foot buffer zone between the Seminoe Reservoir high-water design elevation of 6,363.7 feet and any surface coal mining operations" (EA at 52, Appendix III).

BLM issued coal lease W-82736 containing approximately 2,973.86 acres to Medicine Bow with an effective date of March 1, 1986. Section 15 of the lease, entitled "special stipulations," included the 200-foot buffer zone provision set forth above as Stipulation No. 11. On March 18, 1988, BLM issued a decision approving a lease modification which increased the acreage to 3,013.86 acres. BLM advised Medicine Bow that all terms and conditions of the original lease would apply.

On November 1, 1991, BLM issued Ark a notice of noncompliance for encroachment upon the 200-foot buffer zone bordering the Seminoe Reservoir. Subsequently BLM issued a location correction for this notice of noncompliance. The corrected land description placed the lands in the SE¼ NW¼, sec. 11, T. 23 N., R. 84 W. In the notice of noncompliance BLM stated

an on-site inspection conducted on October 22, 1991, indicated that spoil material had been placed approximately 20 feet from the yellow stakes marking the 100-foot distance from the high-water elevation of 6,357.
BLM estimated that this would be an encroachment of approximately 80 feet upon the buffer zone. The Wyoming Department of Environmental Quality (DEQ) issued Medicine Bow a notice of violation during this inspection and required Medicine Bow to hire a surveyor to resurvey the area and submit a

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2/ In its notice of appeal filed Nov. 13, 1991, Ark describes its relationship to Medicine Bow as follows:

"1. Ark Land Company is the lessee of Federal Coal Lease W-82736 which is subleased to Arch of Wyoming, Inc., an affiliated company. Arch of Wyoming is the successor in interest to Medicine Bow Coal Company by reason of a merger executed on Feb. 28, 1990. Both Ark Land and Arch
of Wyoming are wholly owned subsidiaries of Arch Mineral Corporation."

map delineating the high-water elevation of 6,363.7 feet and the extent of the lands disturbed along the reservoir. BLM requested a copy of the map. It confirmed that Medicine Bow had violated Stipulation No. 11. The map revealed the amount of disturbance within the buffer zone to be approximately .20 acres (8,712 square feet) with a maximum horizontal encroachment of 70 feet past the 200-foot buffer line.

In the notice of noncompliance dated November 19, 1991, BLM stated that aerial photographs of the mine area along the reservoir indicated
two additional areas were in violation of Stipulation No. 11. In the SW¼, sec. 11, T. 23 N., R. 84 W., spoil had been placed within the 200-foot buffer, accounting for about 4,000 linear feet of disturbance. In the SW¼, sec. 13, T. 23 N., R. 84 W., a haul road and sediment pond accounted for approximately 1,500 linear feet of disturbance within the restricted area. BLM noted that on November 12, 1991, DEQ issued an amendment of the original notice of violation to include the new areas identified.

In both notices of noncompliance BLM noted that since the area of infraction was under the jurisdiction of BOR, abatement measures would
need to take into account BOR's recommendations. BLM stated in both notices that it had informed BOR of the areas found to be located within the buffer zone and had requested its recommendations regarding the matter so that adequate protection of Seminoe Reservoir could be ensured. BLM advised Medicine Bow that the action it would be required to implement would be conveyed in subsequent correspondence and would be based on the recommendations of BOR.

BLM stated that once Medicine Bow received and had implemented the action required to resolve the infraction, Medicine Bow would be required to submit a written report to the authorized officer stating that the criteria necessary to correct the violation had been met as required by 43 CFR 3486.3(d). Citing 43 CFR 3486.3(a), BLM informed Medicine Bow that failure to comply with the requirements of the notices of noncompliance could result in an order to cease operations, the initiation of cancellation proceedings, forfeiture of bond, or all of these measures.

In a letter dated December 13, 1991, BLM informed Ark that it had received two letters from BOR on November 14, and December 5, 1991, containing its recommendations on corrective actions required to resolve the notices of noncompliance. BLM advised Ark that in the areas where spoil material had been placed within the 200-foot no surface occupancy zone
in sec. 11, BOR required no action to be taken at that time, but that the approved reclamation schedule should be followed. At the time of reclamation, BLM stated, BOR will require that "spoil piles be removed from the buffer area, and the area recontoured and revegetated with native grasses to approximate as closely as possible that which existed on the site prior to the disturbance."

Regarding the haul road, BLM stated that BOR's primary concern was that a 200-foot wide hydrologic barrier be maintained between the Seminoe Reservoir and any mining activity. BLM explained that the barrier must be restored in the SW¼ sec. 13, T. 23 N., R. 84 W., where the haul road had been excavated to approximately the 6,359-foot elevation. 3/ BLM required Ark to complete the fill and compaction of the haul road within 90 days of receipt of the letter. 4/

In its statement of reasons for appeal (SOR), Ark states that the surface of the land in secs. 11 and 13, T. 23 N., R. 84 W., is owned by private parties and that Ark executed leases of this surface estate with those owners, without restrictions on use, so that it could mine the underlying Federal coal by surface mining methods (SOR at 1-2). Ark disputes BLM's

> ability under a coal lease to restrict the use of private property for the express purpose of protecting other federal properties. Limitations on the use of private property are appropriately exercised by the United States through the use of its police power, not through an instrument conveying a lease for a term of years.

Id. at 5. "Although the United States exercises significant control over surface coal mining activity on private land, it does so by statute, not by lease." Id. at 6. The surface estate in secs. 11 and 13 is not Federal land, as defined by 43 CFR 3400.0-5(o), because it is not "owned by the United States;" therefore, it cannot be regulated under the lease. Id. at 7.

Stipulation 3 of the lease provides that "the final determination [as to compatibility of coal mining activities with BOR activities on Seminoe Reservoir] will be made by DEQ and the Bureau of Reclamation, in consultation with BLM at the mine plan and permitting phase." This language makes

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3/ BLM set forth the specifics of the remedial action as follows:

"Action required to reconstruct this barrier will be to fill and compact the haul road to the stipulated highwater elevation of 6,363.7 feet. The degree of soil compaction should meet specifications acceptable to the Department of Environmental Quality. The BOR states that 'any action which may jeopardize the barrier which was established for hydrologic purposes should cease.'"

4/ BLM further advised that

"[i]f it is shown at a future date that the lessee's actions as described in the Notices of Noncompliance result in the degradation of the water values of Seminoe Reservoir, the BLM would reserve the right to enforce any actions necessary to halt the contamination of the reservoir as a result of these violations."

clear, Ark argues, that Stipulation 11 does not prohibit surface occupancy in a 200-foot zone on both Federal and private property, or else Stipulation 3 would be superfluous. Although Stipulation 11 prohibits occupation of the Federal surface estate within a 200-foot buffer zone, Stipulation 3 means that "any restrictions on surface use of private property could occur only during permitting." Id.

In this connection Ark states that, when it applied for its surface mining permit from the State of Wyoming, it indicated a 200-foot buffer zone (measured from elevation 6363.7) on lands owned by the Federal Government, based on the language of the lease, and a 100-foot buffer zone (measured from elevation 6357) on lands owned by private parties, based on the state surface mining law provision requiring a set-back of this distance for mining near a body of public water. See SOR, Exh. B-1, B-2
(mine plan sequence maps), and C (permit application description of buffer zone signs). This permitting process is the means for the exercise
of the police power, Ark states, and although BLM and the Office of Surface Mining both reviewed Ark's mine plan sequence maps and the buffer
zone description, they took no exception to the clear interpretation in those documents that Stipulation 11 "applied by its terms only to Federal land conveyed by the lease and not to private property which was not conveyed by the lease" (SOR at 10), and failed to require a 200-foot buffer zone for private property and Federal property alike (SOR at 10). As a result, Ark argues,

> [a]lthough a condition regarding surface occupancy was included in the final permit issued by [DEQ], the condition did little more than refer to Stipulation 11 * * * [and thus] the contents of the permit clearly demonstrate the intent of Arch of Wyoming, the permittee and Ark Land's affiliated company, and the authorization of DEQ to impose a less restrictive buffer zone on private surface land. [5/]

(SOR at 9).

Finally, Ark argues that unless we grant a hearing to gather extrinsic evidence on the conduct of the parties before the lease was issued, and on "the subsequent conduct of Ark * * * and Arch of Wyoming in preparing the mining permit and plans for mining to demonstrate the lessee's belief as to what it owned and how it was entitled to utilize its property" (SOR at 8), we are constrained "to construe all of these facts in favor of Ark * * *" (SOR at 8).

Ark requests that we declare BLM's notices of noncompliance void and Ark's interpretation of its lease valid or that we refer the matter for

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5/ Arch of Wyoming succeeded to the operation rights under the lease (SOR at 2 n.1).

a hearing under 43 CFR 4.415 to take extrinsic evidence from Ark, Arch of Wyoming, BLM, "and all other agencies, Federal or state, which claim the right to enforce the provisions of this lease for the purpose of determining the intent of the parties to this transaction" (SOR at 11).

BLM argues we should dismiss Ark's appeal because Ark did not appeal the decision issuing it the lease in 1986 with Stipulation 11 and therefore may not later appeal the enforcement of the stipulation, citing George A. Haddad, Jr., 109 IBLA 394 (1989), and Beartooth Oil & Gas Co., 85 IBLA 11, 92 I.D. 74 (1985) (Answer at 3).

If we do not dismiss the appeal, BLM argues that Stipulation 11 is authorized under the majority view in Blackhawk Coal Co., 68 IBLA 96 (1982), because it was imposed "for the protection of associated Federal property or for the protection of a broad public interest, e.g., the environment"; because it is a specific requirement; and because it has "a statutory premise." Id. at 102. The stipulation is designed to protect the Seminoe Reservoir, it prohibits surface occupancy within 200 feet of the high water mark, and it is based on

> the land use planning requirements of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1988); the study requirements of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C) (1988); and the land use planning and environmental protection requirements of the Federal Coal Leasing Amendments Act (FCLAA), 43 U.S.C. § 201(a)(3) (1988).

(Answer at 4). In addition, BLM argues, Stipulation 11 is authorized under section 30 of the Mineral Leasing Act of 1920, 30 U.S.C. § 187 (1988), which provides that a lease shall contain provisions deemed necessary "for the protection of the interests of the United States * * * and for the safeguarding of the public welfare." Id.

In BLM's view, Ark's mine plan sequence maps and the description of the buffer zone cannot abrogate Stipulation 11 and in any event the surface mining permit issued by DEQ "contains a prohibition on surface activities in a 200-foot buffer zone regardless of Federal or private ownership" (Answer at 4-5).

BLM considers a hearing is "entirely unnecessary given the clarity of the facts" (Answer at 5).

[1] In Beartooth Oil & Gas Co., 85 IBLA 11, 92 I.D. 74 (1985), Beartooth appealed a BLM decision requiring it to mitigate damage to an archeological site. BLM's decision was based on a stipulation that was included as a condition to BLM's granting Beartooth's application for a permit to drill a well (APD) in an area that included the archeological

site. Beartooth did not object to the stipulation at the time its APD was granted. We accepted BLM's argument that "Beartooth's failure to object and its commencement of operations pursuant to the APD gave the BLM every reason to believe Beartooth fully understood Stipulation 17 and agreed to be bound by its terms." 85 IBLA at 19, 92 I.D. at 79.

In George A. Haddad, Jr., 109 IBLA 394 (1989), Haddad appealed a BLM decision informing him BLM would proceed to cancel his oil and gas lease for failure to comply with a stipulation that was included in the lease at the time he signed it. In dismissing his appeal, we held:

> Haddad's appeal must be rejected as untimely. Haddad received notice of the action he now challenges, to-wit, the imposition of the requirement that he commit the leased parcel to the producing unit, from BLM's decision of August 14, 1984, which unequivocally required him to agree to this requirement as a condition to receiving the lease. Haddad was free to appeal at that time, but, under the mandatory provisions of 43 CFR 4.410(c), he was required to file a notice of appeal within 30 days of service of this decision. He did not do so, and, in fact, complied with the decision, thus tacitly agreeing to its terms, including the requirement that he enter into a unit agreement. * * * [W]hen Haddad executed the stipulation rather than filing an appeal his failure to appeal rendered the BLM decision final, and he is now precluded from contending that the requirement should not be imposed.

109 IBLA at 396-97.

In this case, too, Ark's appeal is untimely. Medicine Bow accepted the terms of lease W-82736, including Stipulation 11, when it signed the lease on February 25, 1986. Medicine Bow did not appeal BLM's February 28, 1986, decision issuing the lease. Arch of Wyoming was well aware of the limitations imposed by the language of Stipulation 11, as is evident from its efforts (when it was seeking to modify the lease by adding the 40 acres in sec. 26 in 1988), to persuade BLM to approve its interpretation that Stipulation 11 meant only that no permanent surface structures could be placed within 200 feet of the reservoir but that surface mining could occur in that area. See letter of January 12, 1988, from Arch of Wyoming to Richard Bastin, District Manager, Rawlins District Office, BLM. BLM did not accept the suggested interpretation (letter of February 16, 1988, from the BLM District Manager to Arch of Wyoming), and Stipulation 11 was included without change in the modified lease that was signed on behalf of Medicine Bow on February 25 and 29, 1988. Nor did Medicine Bow appeal BLM's March 18, 1988, decision approving the lease modification and stating that "all terms and conditions of the original lease apply." Having failed to object to Stipulation 11 when it signed the lease, Ark may not appeal BLM's notices of noncompliance with that stipulation on the ground that BLM is not authorized to impose such a stipulation.

We will address the issues Ark raises, however, because we believe its arguments are fundamentally mistaken.

Before obtaining a Federal coal lease, a coal lease applicant must obtain written consent from a qualified surface owner which permits a coal operator to enter and commence surface mining of coal. See 43 CFR 3400.0-5(qq), 3427.2. Pursuant to this regulation, on July 20, 1983, Medicine
Bow filed a surface owner consent agreement between Palm Livestock Company and Medicine Bow which included the land cited in the notices of noncompliance. 6/ However, the fact that these lands are privately owned and that the owner has given the lessee consent to mine on them does not preclude BLM from applying lease stipulations to these lands.

[2] We think it clear that Stipulation 11 is authorized by section 30 of the Mineral Leasing Act of 1920, supra. Section 30 authorizes the Secretary to impose "such other provisions as he may deem necessary * * * for the protection of the interests of the United States * * * and for the safeguarding of the public welfare." In The Montana Power Company, 72 I.D. 518 (1965), Secretary Udall held that it was proper for BLM to include a surface restoration clause in a coal lease even though the surface of the leased lands was not owned by the United States, noting that the clause had been included in all coal leases since March 1951. Id. at 520-21. To the argument that the private owner had no interest in restoration of the surface and the "provision should be limited to acreage the surface of which is owned by the United States," the Secretary responded:

> Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with lands
> of others in which it has reserved the minerals, together with the right to prospect for, mine, and remove the minerals. Furthermore, by the end of the 20-year lease term the ownership of the surface of the land may well have changed and the new owners may have a different attitude from the railroad's.

Id. at 521. In this case, the United States not only has an interest
in the Federal lands coal underlying the privately-owned surface estate (see 43 CFR 3400.0-5(o)) but also an interest in BOR's contiguous Seminoe Reservoir. The EA outlined the public welfare concerns posed by mining near the reservoir that Stipulation 11 is designed to safeguard:

6/ We note that the land descriptions in the notices of noncompliance include more land than is actually listed in the lease for secs. 11 and
13. However, a comparison of the secs. 11 and 13 lands described in the lease with the secs. 11 and 13 lands described in the surface owners agreement shows that the lands in the lease are included in the surface owners agreement.

Interruption/interception of ground and surface hydrologic systems.

Reduction of water quality and quantity through water transfer between the reservoir and mining pits and related impairment of fisheries habitat, general water recreational activities and downstream water users.

Reduction of scenic quality through visual intrusion of the mining operation and related general recreational activities and values.

(EA at 10).

Stipulation 11 also meets the criteria set forth by the majority in Blackhawk Coal Co., supra. The language at issue in Blackhawk required
the lessee to repair damage to any forage and timber growth on Federal or non-Federal lands in the vicinity of the leased lands. The language of Stipulation 11 clearly protects "the water values of Seminoe Reservoir," specifically proscribes surface occupancy within 200 feet of elevation 6363.7 feet, and is premised on the statutory mandate that the Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed under section 202 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712 (1988). 43 U.S.C. § 1732(a) (1988).

In our view, the language of DEQ's surface mining permit controls, not the mine plan sequence maps and the explanation of the difference in the location of buffer zone signs that Ark included in its permit application. The DEQ permit states:

> Additional special conditions and limitations are as follows: * * * 5. No mining activities or surface occupancy will be allowed within a 200-foot buffer zone of the Seminoe Reservoir high water design elevation of 6363.7 feet. Any variance to
> this condition must be approved by the Bureau of Land Management. [Emphasis supplied.]

See Ark's Exh. D, page 4 of 4. In addition to the clear reference to Stipulation 11, this language offers no basis for distinguishing between the size of buffer zones on privately-held and publicly-held surface and there is no reference to this distinction in the application. If the DEQ agreed with Ark that the mine plan sequence maps in the application were controlling, presumably it would not have issued a Notice of Violation of the permit during the October 22, 1991, inspection -- a notice that was upheld on review by the Director of the DEQ.

Ultimately, however, whether Ark was in compliance with its Wyoming DEQ permit is irrelevant to whether it violated Stipulation 11 of its

Federal coal lease. As the Wyoming DEQ stated in its February 18, 1988, letter to BLM concerning Medicine Bow's interest in mining within the 200-foot buffer zone:

> The 200 foot buffer zone is a condition of the coal lease and our position is that BLM, as the lessor, must grant the variance. Based on technical or environmental reasons, we have no objections to granting the variance. However, we will require the company to abide by the lease stipulations, unless BLM, as the lessor, changes the requirements.

No hearing is necessary to determine the intent of the parties to this lease. The language of Stipulation 11 is clear. From BLM's perspective, its origin and purpose are evident from the EA. Medicine Bow was also clear about its meaning, as is evident from the fact that in the application for the lease that Medicine Bow submitted in September 1982 the mine plans were based on the assumption that a "two hundred (200) foot buffer zone would be left between mining activities and the high water elevation of 6357" (Application at 9). "A hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. * * * This Board 'should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them."' Woods Petroleum Co., 86 IBLA 46, 55 (1985). Under this standard, we decline to exercise our discretion under 43 CFR 4.415 to refer this matter for a hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of BLM's notices of noncompliance dated November 1 and November 19, 1991, are dismissed.

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Will A. Irwin
Administrative Judge

I concur:

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James L. Burski
Administrative Judge